

1 UNITED STATES COURT OF APPEALS

2
3 FOR THE SECOND CIRCUIT

4
5 August Term, 2010

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7
8 (Calendar: June 14, 2011 Decided: June 24, 2011)

9
10 Docket No. 11-1249-ag

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12 - - - - -x

13
14 LUISA MALDONADO-PADILLA,
15
16 Petitioner,

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18 - v.-

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20 ERIC H. HOLDER, JR., United States
21 Attorney General,
22
23 Respondent.

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25 - - - - -x

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27 Before: JACOBS, Chief Judge, in Chambers.

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29 The petition for review is transferred sua sponte to
30 the Fifth Circuit Court of Appeals based on improper venue.
31 I must determine, on this single-judge motion, whether to
32 exercise discretion to grant a temporary stay of removal
33 pending completion of the transfer. For the following
34 reasons, the stay is denied.

1 Luisa Maldonado-Padilla, pro se,
2 Brooklyn, New York, Petitioner.

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4 Edward Clark Durant, United
5 States Department of Justice,
6 Civil Division, Office of
7 Immigration Litigation,
8 Washington, District of
9 Columbia, for Respondent.

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12 DENNIS JACOBS, Chief Judge:

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14 This matter is before me as a one-judge motion to
15 determine whether this petition should be transferred sua
16 sponte to the Fifth Circuit Court of Appeals, which is where
17 the underlying immigration proceedings took place, and
18 whether to grant petitioner Luisa Maldonado-Padilla's motion
19 for a stay of removal pending completion of the transfer of
20 venue.

21 The petition for review should have been filed in the
22 Fifth Circuit and transfer of venue is appropriate. 8
23 U.S.C. § 1252(b)(2); see also Moreno-Bravo v. Gonzales, 463
24 F.3d 253, 257 (2d Cir. 2006). Maldonado-Padilla's motion
25 for a stay of deportation, Certified Administrative Record
26 ("CAR") at 5, is properly construed as seeking a stay
27 pending completion of the transfer of her petition for
28 review. That is because, upon transfer of the petition for
29 review, jurisdiction will vest with the Fifth Circuit and

1 this Court will no longer have jurisdiction. See In re
2 Warrick, 70 F.3d 736, 739 (2d Cir. 1995) (observing that
3 generally, when a motion for a transfer is granted and the
4 papers lodged with the transferee court, the transferor
5 court no longer possesses jurisdiction). As the Supreme
6 Court has made clear, “[a] stay is not a matter of right,”
7 and under the circumstances of this case I decline to
8 exercise my discretion to impose a stay of removal pending
9 completion of the transfer of venue. Nken v. Holder, 129 S.
10 Ct. 1749, 1760 (2009) (internal quotation marks omitted).

11 **BACKGROUND**

12 Luisa Maldonado-Padilla, a native and citizen of
13 Ecuador, entered the United States in 1994 without
14 documentation. CAR at 5. Upon her entry into Texas, she
15 was detained by the Border Patrol. Id. She was personally
16 served with an Order to Show Cause that advised of her
17 obligation to provide a current mailing address to the
18 Immigration Court. Id. at 17. Maldonado-Padilla was
19 released from custody after the posting of a bond and she
20 provided a mailing address in New Jersey. Id. at 5. She
21 never provided a new or updated address. Notice of a
22 removal hearing was mailed to the address she provided, but

1 it was returned indicating that she had moved. Id. at 17.

2 Maldonado-Padilla failed to appear for her removal
3 hearing, and was consequently ordered removed in absentia.

4 Id. Nearly fifteen years later, Maldonado-Padilla moved to

5 reopen her removal proceedings on the ground that she did

6 not receive notice of the hearing. She also urged the

7 immigration court to reopen removal proceedings on the

8 ground that she was now eligible to adjust her status to

9 that of a lawful permanent resident. Id. at 19. The

10 immigration judge denied Maldonado-Padilla's motion to

11 reopen, finding that the in absentia order was properly

12 entered because the notice of the removal hearing had been

13 mailed to the last address provided by the petitioner. See

14 Lopes v. Gonzales, 468 F.3d 81, 84 (2d Cir. 2006) (per

15 curiam). The motion to adjust her status was rejected as

16 untimely. See 8 C.F.R. § 1003.23(b)(1). Finally, the

17 immigration court found no "exceptional circumstance[]" that

18 might justify an exercise of discretion to reopen the

19 proceeding sua sponte. In re J-J-, 21 I. & N. Dec. 976, 976

20 (BIA 1997); see also 8 C.F.R. § 1003.2(a).

21 The Board of Immigration Appeals ("BIA") dismissed

22 Maldonado-Padilla's appeal from the denial of her motion to

1 reopen, agreeing with the immigration judge that she was
2 "adequately notified of her hearing." CAR at 17. The BIA
3 further observed that Maldonado-Padilla was not entitled to
4 receive actual notice of her removal hearing because she
5 concededly "did not comply with her obligation to provide
6 and update her mailing address to the Immigration Court."
7 CAR at 17, 19. The agency emphasized that Maldonado-Padilla
8 was aware that she was subject to removal since at least
9 2004, but "allowed nearly another six years to elapse before
10 filing a motion to reopen." CAR at 19. Maldonado-Padilla
11 seeks review of the decision of the BIA in this Court.

12 **I**

13 A petition for review "shall be filed with the court of
14 appeals for the judicial circuit in which the immigration
15 judge completed the proceedings." 8 U.S.C. § 1252(b)(2).
16 In this case, that court is the Court of Appeals for the
17 Fifth Circuit. See 28 U.S.C. § 41. Although § 1252(b)(2)
18 is not a jurisdictional mandate and I am not compelled to
19 transfer this petition, I nonetheless deem transfer
20 appropriate under the circumstances of this case. Moreno-
21 Bravo, 463 F.3d at 257-58. Certainly, no reason has been
22 presented that would cause me to conclude that the Fifth

1 Circuit is an "unjust forum for [t]his petition." Amunikoro
2 v. Sec'y of Dep't of Homeland Sec., 432 F.3d 383, 387 (2d
3 Cir. 2005).

4 True, "[v]enue is a doctrine of convenience of the
5 forum[,]” and “[d]omicile is usually the best measure of
6 that convenience.” Kahane v. Carlson, 527 F.2d 492, 494 (2d
7 Cir. 1975). In the context of a petition for review of a
8 denial of a motion to reopen, however, Congress has
9 specified the proper venue. Absent some compelling reason
10 (not present here), a petitioner should not be able to
11 choose otherwise. See Trejo-Mejia v. Holder, 593 F.3d 913,
12 915-16 (9th Cir. 2010) (concluding “transfer would serve the
13 interest of justice” when petition for review filed in wrong
14 circuit court).

15 II

16 The grant or denial of a stay is a matter committed to
17 discretion. Nken, 129 S. Ct. at 1760. There have been
18 instances in which this Court has issued a stay of removal
19 pending the arrival of papers in a proper venue. However,
20 “[a] stay is an intrusion into the ordinary processes of
21 administration and judicial review,” id. at 1757 (internal
22 quotation marks omitted), and “[t]he party requesting a stay

1 bears the burden of showing that the circumstances justify
2 an exercise of [the Court's] discretion," id. at 1761.
3 Here, Maldonado-Padilla has not sustained her burden of
4 demonstrating why a stay should be granted: no showing of
5 likely success on the merits has been made; no substantial
6 legal question has been raised; and, "[a]lthough removal is
7 a serious burden . . . , it is not categorically
8 irreparable." Id. Moreover, "[t]here is always a public
9 interest in prompt execution of removal orders," id. at
10 1762, and that interest has already been disserved by the
11 prolonged delay in these proceedings. I may not "simply
12 assume that ordinarily, the balance of hardships will weigh
13 heavily in the [petitioner's] favor." Id. (internal
14 alterations and quotation marks omitted).

15 Prior to the passage of the Illegal Immigration Reform
16 and Immigrant Responsibility Act of 1996, "aliens appealing
17 a decision of the BIA were generally entitled to an
18 automatic stay of their orders of removal pending judicial
19 review." Leiva-Perez v. Holder, 640 F.3d 962, 2011 WL
20 1204334, at *1 (9th Cir. Apr. 1, 2011) (per curiam).
21 "Congress eliminated the automatic stay provision, but left
22 intact the authority of the courts of appeal to grant stays

1 as a matter of discretion." Id. I decline to grant a stay
2 as a matter of course as if it were (as once it was) a
3 matter of right.

4 On the present record, I cannot conclude that this
5 petition was filed in this Circuit with the intention of
6 effectuating a delay of the proceedings that may ultimately
7 lead to Maldonado-Padilla's removal. See Rosendo-Ramirez v.
8 INS, 32 F.3d 1085, 1092 (7th Cir. 1994) (concluding it did
9 not appear that the parties had engaged in forum-shopping).
10 At the same time, the venue error has had that effect.
11 Accordingly, as a prudential matter, I decline to exercise
12 my discretion to grant a stay to guard against possible
13 removal while this petition is transferred to the court in
14 which it should have been brought to begin with. See
15 Michael v. INS, 48 F.3d 657, 666 (2d Cir. 1995) (observing
16 that even if this Court had the power to grant the
17 "extraordinary relief" of a stay, "every prudential
18 consideration argues against it") (Jacobs, C.J.,
19 dissenting).

20 For the foregoing reasons, the petition for review is
21 transferred to the United States Court of Appeals for the
22 Fifth Circuit and the motion for a temporary stay of removal
23 pending completion of the transfer is denied.